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No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1962

GUNDERSON BROS. ENGINEERING CORPORATION, an Oregon corporation,

Petitioner,

v.

MERRITT-CHAPMAN AND SCOTT CORPORATION, a Delaware corporation,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE CASE

In addition to Petitioner's statement of the case, the following chronology of events occurring in the course of the negotiations, we believe, will be of critical aid to the Court in ascertaining that there was never at any time "a meeting of the minds" of the parties tending to form a binding contract.

1. On March 9, 1956, Gunderson by long distance phone made the first offer, to furnish gates, exclusive of hoists and anchorage for $1,015,844 f.o.b. rail. (Tr. 469, 470)

2. Later, on that day, by long distance Gunderson quoted a price of $74,032.00 f.o.b. rail for draft tube gates, but did not quote for the frames and guides for them (Tr. 472, 473)

3. On March 10, 1956 (Saturday), Gunderson mailed from Portland to Respondent at Spokane its written quotation. This was not a firm offer, but was qualified in several respects, in particular with reference to prices, where Petitioner introduced the following "escalator" clause:

> " . . . prices based upon current shop labor rates and material costs. Any increase in either will be charged to the account of the purchaser . . . "

At the bottom of the quotation is the following phrase: "no embedded material." (Tr. 66-70)

This was not received by Respondent until it had submitted its bid on the general contract, which was formally opened at Ephrata, Washington, on Monday, March 12, 1956. (Tr. 472, 473)

4. On April 20, Gunderson offered to furnish the hoists for $727,050.00 (Tr. 137, 174). On July 18, Gunderson offered to furnish structural steel anchorages for $251,261.00. (Tr. 138, 140)

5. Shortly after July 18, Gunderson rewrote its original proposal eliminating the price escalator clause by adding $74,800.00 to the price of the tainter

gates and making other changes (Tr. 179-180, Tr. 192-193). This was objected to by Respondent's Washington representative (Tr. 259).

6. On July 30, Gunderson again added $50,000.00 to its total of bids to which the Washington representative of Respondent again remonstrated, "I don't know how New York [Respondent's headquarters] is going to look at this." (Tr. 190, 191)

7. After careful consideration of these various bids with their changes and price increases, on August 10, Respondent advised Gunderson by wire that the spillway gates order had been placed with another supplier. (Tr. 204, 205)

8. On receipt of this information, Gunderson wrote to Respondent a long letter setting forth that their engineering costs were substantial and concluded:

> "We have been placed to a great amount of expense in preparing our bid, and in view of all of the circumstances regarding our *negotiations* with your company, we feel that we should be reimbursed for same. [Emphasis added]
>
> "We should like very much to hear from you regarding your thoughts about this particular situation." (Tr. 406)

A prompt reply was made by Respondent to this letter whereupon Gunderson wrote a second letter (Tr. 417, 418) stating:

"At the conclusion of the conference you said you were forwarding the purchase order to New York for approval. I asked if it would be safe to proceed with drawings and material planning, and you said it would. You also said the New York office may request further price refinements, and you will recall I left the door open on this phase for further discussion. Therefore, our figures were not *necessarily* final figures as you state."
(Emphasis added)

ARGUMENT

1. Petition Presents No Issue Warranting Review by This Court.

Rule 19(1) of the Rules of this Courts reminds litigants and their counsel that "a review of writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted *only* where there are special and important reasons therefore." (Emphasis added) Rule 19(1)(b) indicates the general character of reasons that will be considered by the Court in deciding whether to grant review of a decision by a federal court of appeals.

The present case presents no special and important reasons of the type generally considerd necessary to justify the granting of a writ of certiorari. This case involves nothing more than a plea of a disappointed corporate litigant, that has lost in th Court of Appeals and now hopes it can somehow prevail upon this Court to re-examine and reverse the decision below.

even though the case involves (a) no conflict among circuits, (b) no decision in conflict with applicable state law, (c) no important federal question, (d) no departure from the accepted and usual course of judicial proceedings, and (e) no other significant question that ought to be resolved by this Court as matter of general public interest.

2. Petitioner Ignores the Law of Contract.

(Petitioner's Points?) Here, Petitioner has unwittingly disclosed the central weakness of its petition for the writ by the cases it thrusts into the foreground of its argument, beginning with *Williams v. Carolina Life Ins. Co.*, 210 F. 2d 477, rev'd 348 U.S. 802, and concluding with *Johnson v. Union Pacific R. Co.*, 233 F. 2d 427, rev'd 352 U.S. 957, to which should be added *Dick v. New York Life Ins. Co.*, 359 U.S. 437. Not one of these cases is concerned with the fundamental issue here presented — the adequacy of Petitioner's evidence to satisfy the legal requirements respecting offer and acceptance in the law of contracts.

On the contrary, all of these cases are concerned with the purely factual issues involving elements of dispute in negligence, insurance and FELA cases.

Furthermore, in this case, even after drawing all *inferences* from the evidence in favor of Petitioner, there was still insufficient evidence of a definite offer and a precise acceptance to go to the jury.

Where, as here, the facts are not in dispute, the question whether the parties have definitely reached a binding agreement upon the terms of a contract raises a question for the judgment of the Court, not for the verdict of the jury. On this fundamental distinction between the law governing these purely factual disputes and the basic principles of contract, the following from Volume 17 C.J.S., p. 1271, states hornbook law:

> "The question whether a certain or undisputed state of facts establishes a contract is one of law for the court. Thus, when the language relied on to establish an oral or a written contract is clear or undisputed, the question of its sufficiency is for the court."

In *Bell v. Ralston Purina Co.*, 257 F. 2d 31 (1958), where a dispute as to the existence of a contract was under discussion, the U. S. Court of Appeals (10th Cir.) stated the rule:

> "The establishment of a contract from a set of facts is a question of law for the court. 17 C.J.S., Contracts, §611."

To the same effect: *Ohmer v. Allen*, 79 F. 2d 942; *Evans v. Ely*, 13 F. 2d 62, 64; same case, 30 F. 2d 912.

But, more important is the fact that this rule has been adopted by the Supreme Court of the State of Washington, in which state the negotiations for the proposed contract were conducted and where the proposed contract was to be performed.

In *Schulze v. General Electric Co.*, 108 Wash. 401; 184 P. 342, the trial judge submitted to the jury the correspondence that plaintiff contended constituted a contract, and the jury found for the plaintiff. Reversing the trial court, the Washington Supreme Court held:

> "Where a transaction consisted wholly of letters and telegrams, whether the correspondence constituted a contract is a question for the court."

See, to same effect, *Kuh v. Lemcke*, 107 Wash. 45, 180 P. 889, and *Milone, etc. v. Bona Fide Builders, Inc.*, 49 Wash. 2d 363, 301 P. 2d 759.

These cases demonstrate that if Plaintiff's evidence in this case had been submitted to a jury by a trial judge of this state, the Supreme Court of Washington would unhesitatingly have reached the same result as did the Court of Appeals in this case.

Furthermore, the *Kuh* case quoted, and the *Schulze* case repeated, the language of *Baker v. Johnson County*, 37 Ia. 186, which is:

> "An offer by one party assented to by the other will generally constitute a contract, but the assent must comprehend the whole of the proposition, It must be exactly equal to its assent and terms and must not qualify them by any new matter."

The opinion of the Court of Appeals in this case demonstrates to a nicety the failure of the plaintiff

to make its assent "comprehend the whole of the proposition . . . to be exactly equal to its assent and terms . . ."

The Supreme Court of Washington has followed the universal rule that the minds of the parties must meet "on the same and exact of terms."

> "An acceptance of an offer must always be identical with the terms of the offer, or there is no meeting of the minds and no contract." *Owens-Corning Fiberglass Corp. v. Fox Smith Sheet Metal Co.*, 56 Wash. 2d 167, 351 P. 2d 516; *Blue Mountain Const. Co. v. Grant Co. School Dist.*, 49 Wash. 2d 685, 306 P. 2d 209; *Ferris v. Blumhardt*, 48 Wash. 2d 395, 293 P. 2d 935; *Thomas H. Bringham v. Am. Bridge Co.*, 39 Wash. 3, 80 P. 788.

See *Strange and Co. v. Puget Sound Depot*, 176 Wash. 90, 28 P. 2d 111; *Loewi v. Long*, 76 Wash. 480, 136 P. 673. The following further cases show how deeply rooted in the law of Washington is this principle of offer and acceptance, the adequacy of which is for the court to determine: *Lost Lake Lumber Co. v. Smith*, 29 Wash. 713, 70 P. 134; *Citizen's Nat'l Bank v. Arisa*, 68 Wash. 448, 123 P. 593; *Sillman v. Spokane S. & L. Assoc.*, 103 Wash. 619, 175 P. 296; *Blackiston v. Osgood Panel & V. Co.*, 173 Wash. 435, 23 P. 2d 397.

By contrast, it is significant that Petitioner so completely avoids any reference to these basic principles of the law of contracts and the cases elucidating them.

In the case of *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wash. 2d 109, 173 P. 2d 194, the Washington Supreme Court refused to enforce a claimed contract because the offer was so indefinite and uncertain that the Court was unable to determine what must be done to contstitute performance. The Court quoted with approval from Williston on Contracts, Rev. Ed., Vol. 1, p. 49, Sec. 24, as follows:

> "The chief requirement is that the promise shall be sufficiently certain in its terms to enable the court to understand what the promissor undertakes. Likewise an offer must state with the same certainty the act or promise which the offeror agrees to take in return for his promise if the offeree accepts; . . ."

And from p. 99, Sec. 37:

> " 'A lack of definiteness in an agreement may concern the time of performance, the price to be paid, work to be done, property to be transferred, or miscellaneous stipulations in the agreement. Especially a reservation to either party of a future untrammeled right to determine the nature of the performance, or a provision that some matter shall be settled by future agreement, has often caused a promise to be too indefinite for enforcement.' "

Thereupon, the Supreme Court held that certain conversations and correspondence between the parties constituted nothing more than "preliminary negotiations."

To the same effect, see *Schuehle v. Schuehle*, 21 Wash. 2d 609, 152 P. 2d 608; *Sandeman v. Sayres*, 50 Wash. 2d 539, 314 P. 2d 428; *Spooner v. Reserve Life Ins. Co.*, 47 Wash. 2d 454, 287 P. 2d 735; *Weldon v. Degan*, 86 Wash. 442, 150 P. 1184.

In *General Accident F. & L. A. Corp. v. Smith and Oby Co.*, 272 F. 2d 581, 583, the Sixth Circuit, dealing with the law of contracts and reversing the trial judge, found it necessary to point out that:

> "The vigorous conflict between the parties comes in the task of applying the agreed law to the agreed facts. Such an application of the law to the facts is a question of law." (Citing cases)

See, also, *State of Washington v. United States*, 214 F. 2d 33, (Cert. den'd 348 U. S. 802).

3. Petitioner Praises Ninth Court of Appeals But —

(Petitioner's Point 3). Petitioner returns to its original blurring of distinctions between merely factual disputes erroneously withheld from jury decisions and the question whether the evidence taken in its most favorable light discloses the making of a contract, by citing three more of its factual disputes as indicative of the fact that normally the Ninth Circuit favors jury trials in such cases. For reasons earlier discussed in this brief, this praise of the record of the Ninth Circuit, though no doubt deserved, seems strangely out of place, as does Petitioner's criticism

of the opinion in *Trivette v. New York Life Ins. Co.*, 283 F. 2d 441, in the teeth of the fact that your Honrs denied the writ in this case (368 U. S. 838).

4. Petitioner Objects to District Judge.

(Petitioner's Point 4) Counsel for Petitioner are so hard pressed for grounds on which to plant their application for the writ that, without citation of case or text to support them, they object at some length to the presence on the Court of Appeals of Washington District Judge Beeks (Pts. Br. 13-15) on the grounds that:

> "A district judge of one state would be in a position to 'second guess' the district judge of the same state who tried the case on matters of sufficiency of the evidence and local law."

Counsel for Petitioner even criticize the Chief Judge of the Court of Appeals, because, as they phrase it, it was his duty to see that:

> ". . . if a district judge is selected to sit upon the court, no possibility can exist for speculation as to where the court looked for guidance to local law."

Is it logical to suggest that a district judge is disqualified from sitting on the Court of Appeals when cases come before that court from his own state, because he knows the decisions of its courts, and that other district judges should be selected for their

ignorance of those decisions? Are we to place a premium on ignorance, and a discount upon knowledge? Truly, a strange paradox.

A number of answers to this specious argument will at once occur to this Court. But a conclusive answer is that Petitioner's counsel knew, far better than the Chief Judge, just the issues involved in this case and the fact that these issues would be determined by a court on which a district judge of Washington would be one of the members. If Petitioner's counsel thought it improper for a district judge of Washington to sit on the United States Court of Appeals while hearing the appeal from another district judge of that state, was it not incumbent upon them to raise that issue before argument? Can they be heard to raise that issue for the first time after the decision of the United States Court of Appeals has gone against them?

5. Petitioner Claims Violation of Seventh Amendment.

(Petitioner's Point 5). Petitioner ascends still further into the stratosphere when it cites *Cone v. West Va. Paper & Pulp Co.*, 330 U.S. 212, which holds that a U.S. Court of Appeals cannot grant judgment n.o.v. where such a motion was not initially made in the district court. This, in spite of the fact that it plainly appears that the motion n.o.v. was made in the district court in this case. The reasoning by which this case

is supposed to justify certiorari here is altogether too thin and tenuous for us to be able to follow it.

Similarly, Petitoner's reference to another of its many tort cases, *Breece v. Chapman & Sons*, 302 F. 2d 581, where the writ has since been granted by this Court, is just one more instance of Petitioner's aversion from the law of contracts, its unwillingness to discuss the real issue: Was there substantial evidence indicating a meeting of the minds of the parties on all of the terms of their proposed contract?

Under this heading, Petitioner also argues that it has been deprived of the protection of the Seventh Amendment. The thrust of its argument appears to be that whenever a Court of Appeals sets aside a jury verdict for insufficiency of the evidence, it is incumbent on this Court to review the decision below on the theory that a grave constitutional issue is involved.

Petitioner seems to think that the Seventh Amendment precludes a Court of Appeals from ever re-examining the evidence in a jury case. This supposition flies in the face of the plain language of the Amendment, which permits a court to re-examine such evidence "according to the rules of the common law." Appellate Courts have traditionally had the power to re-examine the evidence in order to determine its sufficiency and to determine whether the trial judge

committed error in submitting the case to the jury, and the Court of Appeals here did no more than that.

As the Court pointed out in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 659 (1935):

> "Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court."

And in *Gunning v. Cooley*, 281 U.S. 90, 94 (1930), the Court reaffirmed the traditional rule that:

> " 'In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' " (Citing cases)

In view of Petitioner's admirable diligence in uncovering purely factual issues in negligence, insurance and FELA cases, where this Court has reversed Courts of Appeal that had set aside jury verdicts, it may not be out of place to remark that in many more instances, this Court has denied certiorari in situations involving directed verdicts or judgments n.o.v. in both contractual and non-contractual cases. See, *e.g.*, the recent decisions in *Lee v. Jenkins Bros.*, 268 F. 2d 357 (2nd Cir.) 1959; *Black v. Sinclair O. & G. Co.*, 294 F. 2d 580 (5th Cir., 1961) cert. den'd. 369 U.S. 849; *No. Carolina Nat. Gas Corp. v. McJunkin Corp.*, 300 F. 2d

794 (4th Cir., 1961), cert. den'd. Oct. 8, 1962, 31 U.S. L.W. 3117; *Firemen's Ins. Co. v. Robbins Coal Co.*, 288 F. 2d 349 (5th Cir., 1961), cert. den'd. 368 U.S. 875; *Trivette v. N. Y. Life Ins. Co.*, 283 F. 2d 441 (6th Cir., 1960) cert. den'd 368 U.S. 838; *Manaia v. Potomac Elec. Power Co.*, 268 F. 2d 793 (4th Cir., 1959), cert. den'd 361 U.S. 913.

Petitioner's attempt to convert this case into one involving great constitutional issues can best be characterized by quoting the recent opinion in the *Manaia* case, supra, where the Court in affirming judgment n.o.v. for the defendant in a negligence case, wrote:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment . . . The power of the court to withdraw such cases from the jury is too firmly rootel in history and tradition for frontal attack . . . the attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this."

To the same effect, see Chief Judge Magruder's opinion in *Smith v. Reinauer Oil Tr., Inc.*, 256 F. 2d 646 (1st Cir., 1958).

6. Petitioner Claims Conflict Between Circuits.

(Petitioner's Point 6) Equally far afield is Petitioner's point that it is relevent for this Court to settle in this case the alleged dispute respecting the

"law of the case" between the U.S. Courts of Appeal for the Second and Eigth Circuits. In our case, the Ninth Court of Appeals in no respect disregarded "the law of the case" as made by instructions of the trial judge.

On the contrary, the Court of Appeals merely held, in accordance with the many decisions of the Supreme Court of Washington that we have heretofore cited, that is was error to leave to the jury as a matter of fact the question of the adequacy of the undisputed evidence to show that a completed contract had been agreed upon by the parties when under the law of this state and all other states that was a question of law to be determined by the trial judge.

Further, a critical study of *Pierce Cons. Co. v. Burlington*, 221 F. 2d 607 (2nd Cir.), and *Coca Cola B. Co. v. Hubbard*, 203 F. 2d 859 (8th Cir.) (not 186 F. 2d 148, as cited in the Petition), discloses that Petitioner is plainly in error in asserting a conflict between these Circuits.

And see particularly *Lyons v. Empresa Hondurena De Vapores S.A.*, 273 F. 2d 317, 319 (2nd Cir. 1959), where the Second Circuit expressed exactly the same views as the Eighth Circuit. This Court denied certiorari in 363 U.S. 963 (1960) on the precise question of whether an unchallenged jury instruction becomes the law of the case.

7. Petitioner Urges That Western Asphalt Co. v. Valle, 25 Wash. 2d 428, 171 P. 2d 159, Disregarded by Court of Appeals.

(Petitioner's Point 7) Under this heading, Petitioner takes the position that the two cases, *Western Asphalt Co. v. Valle* (1946), 25 Wash. 2d 428, 171 P. 2d 159, and the later case of *Milone, etc. v. Bona Fide Builders, Inc.*, (1956), 49 Wash. 2d 363, 301 P. 2d 759:

> "... made the Washington law doubtful which required the Court of Appeals, for that reason alone, to follow the permissive views of the above trial judge."

In what respect was the Washington law doubtful? Petitioner does not say. A study of these two cases leaves no room for this claim. In the *Milone* case, the earlier *Western Asphalt* case is clearly and definitely distinguished. Actually, Petitioner is foreclosed from relying on the *Western Asphalt* case, supra, because in that case, the plaintiff was not claiming an agreement to be awarded the sub-contract but was merely claiming reimbursement for its services in preparing and submitting his bid.

Petitioner, assuming that it might not be able to prove a contract, had alleged in its first cause of action an implied-in-fact contract to pay Petitioner for services rendered in preparing and submitting its written offer. But in this case, the trial judge dismissed this first cause of action of Petitioner at the close of Pe-

titioner's case, because there was no testimony to support it, from which ruling Petitioner did not appeal. This obliged Petitioner to base its right of recovery solely on its second cause of action, to-wit, on an express or implied-in-fact contract that Petitioner would be given a sub-contract for the items in question. Here, it ran headlong into the later *Milone* case, supra, and it has been trying ever since, to get back to the *Western Asphalt* case, but without avail. In fact, there is no conflict expressed between the trial judge and the Court of Appeals as to the law of Washington respecting the *Milone* case and the earlier *Western Asphalt* case.

In this instruction to the jury, the trial judge warns the jury that the fact

> "... that defendant put the name of the plaintiff in its bid as the supplier of the gates and hoists in bid item 8.1A is not evidence of a completed contract between the parties." (R. 687)

The statement of the Washington law corresponds with the Court of Appeals' statement that "In Washington, use of a bid by a prime contractor is not the legal equivalent of acceptance." Citing the *Milone* case.

Where the trial judge committed error was in further saying to the jury in this instruction that this use of the name of the supplier

> ". . . may be considered with all of the *other evidence in the case* in making your determination of whether there was a complete offer and acceptance and a meeting of the minds in order to constitute a bilateral contract." (Emphasis added) R. 687)

Here, the trial judge abdicates his function which was to determine in the first instance, as a question of law, whether there was any evidence of "a complete offer and acceptance."

8. Petitioner Urges Milone v. Bona Fide Builders Merely Makes Washington Law Doubtful.

(Petitioner's Point 8, pp. 17-18) Petitioner here asks this Court to hold that "after the general contractor uses and benefits by a subcontractor's bid" he cannot later cast him aside. This emphasis on the controlling importance of the subcontractor's bid or estimate as implying acceptance from the mere passage of time is much more than a request to this Court to reverse our Court of Appeals in this case. It also, in effect, asks the Court to reject the *Milone* case, which considers at length the doctrine of contracts implied-in-fact with reference to the bid of a subcontractor and decisively rejects it.

But on this point, the *Milone* case does not stand alone. In *Kellogg v. Gleeson*, 27 Wash. 2d 501, 505, 178 P. 2d 969, the rule respecting implied contracts was stated as follows:

> "The burden of proving an express or implied contract is on the party asserting it, and he must prove each fact essential thereto, including the existence of a mutual intention. Where circumstantial evidence is relied on, the circumstances must be such as to make it reasonably certain that the parties intended to and did enter into the alleged contracts."

The above language was quoted by the Washington Supreme Court and applied in denying existence of an implied contract in the case of *Ross v. Raymer*, 32 Wash. 2d 128, 139, 201 P. 2d 129.

9. Petitioner Argues Its Evidence Made Case for Jury.

(Petitioner's Point 8, pp. 18-21) Here, Petitioner's major contention is that a general contractor "cannot lead the sub-contractor to believe for almost five months that he has accepted the offer and that the *perfunctory* purchase order will be later issued." (p. 18) (Emphasis added)

This so-called "perfunctory" purchase order is the written acceptance of the proposal of the bidder, the binding contract which determines that the minds of the parties have finally met in agreement on all of the terms of the contract. It has special importance where the amount involved is over two million dollars and the contract involved many complex details.

The calendar of the several proposals made by Petitioner during this five months period, recited in our

Statement of the Case, discloses the preliminary character of the negotiations up to the time when Respondent placed its order elsewhere. After negotiations had been thus broken off, Petitoner referred to the course of conduct of the parties as "negotiations," not a contract. (Tr. 406) In its later letter, it affirmed that its last offer to Respondent "left the door open . . . *for further discussion*, therefore our figures were *not* necessarily final figures." (Tr. 417, 418) (Emphasis added)

Assuredly, this disclaimer of Petitioner made after the negotiations had been broken off, is evidence of the most persuasive character that no complete and binding contract had been entered into by the parties. What other conclusion, then, could the Court of Appeals reach than that the parties were still bargaining until the time when Respondent, dissatisfied with Petitioner's repeated price increases, placed its order elsewhere, only 11 days after Petitioner's last price raise?

10. Petitioner Urges an Implied-in-Fact Contract.

(Petitioner's Point 8, pp. 22-24) Petitioner's last contention is that the evidence made a question for the jury on an "implied-in-fact", if not express, contract," that the jury "could have found acceptance from inferences" (p. 24). This is well answered by the follow-

ing language used by the Supreme Court of Washington in the *Milone* case as follows:

> "Before a court can find the existence of an implied contract in fact, there must be an offer; there must be an acceptance, the acceptance must be in the terms of the offer; it must be communicated to the offerer; there must be a mutual intention to contract; (*Chandler v. Washington Toll Bridge Authority*, 17 Wash. 2d 591, 137 P. 2d 97); there must be a meeting of the minds of the parties. (*Richards v. Kuppinger*, 46 Wash. 2d 62, 66, 278 P. 2d 395.)"

To the same effect, see also *Troyer v. Fox*, 162 Wash. 537, 554, 298 P. 733.

Furthermore, in looking at the disconnected nature of the testimony of Petitioner, we bear in mind that the Supreme Court of Washington has well established the rule that the facts relied upon to make a case of circumstantial evidence must be of such a nature and the facts must be so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them:

Arnold v. Sanstol, 43 Wash. 2d 94, 260 P. 2d 327;

Berkovitch v. Luketa, 49 Wash. 2d 433, 302 P. 2d 211;

Falconer v. Safeway Stores, Inc., 49 Wash. 2d 478, 303 P. 2d 294;

Ruff v. Fruit Delivery Co., 22 Wash. 2d 708, 157 P. 2d 730;

Gardner v. Seymour, 27 Wash. 2d 802, 180 P. 2d 564;

Neel v. Henne, 30 Wash. 2d 24, 190 P. 2d 775.

Nowhere does Petitioner come to grips with the essential issue in this case — the necessity to show a precise offer by it that Respondent could or did accept. At no point does counsel seek to show a meeting of the minds, a time when Petitioner made a complete and unconditional offer that Respondent accepted.

Indeed, Petitoner's theory of implied contract is simply an effort to offer a substitute for this failure of agreement.

11. Was Respondent's "Unsolicited Communication" of Use of Bid an Acceptance?

(Pet. Br., pp. 22-23) Petitioner's most far-fetched argument is that a mere "unsolicited communication" of the fact that Respondent had used its bid was, of itself, an acceptance of that bid, therefore a contract arose at that time. This is an impossible position. This "unsolicited communication" was sent at the beginning, not at the end, of this five months period of negotiations which Petitioner inconsistently argues is what led it to believe that its bid was finally accepted.

At the time of this "unsolicited communication," Petitioner had given its estimate covering only little over one half of what it was supposed to cover, as is demonstrated by the later negotiations set up in the calendar of events in our Statement of the Case.

Apart from these facts, the Washington Supreme Court in the *Milone* case considered at length this very same contention, quoting from a leading Utah case as follows:

> "In *R. J. Daum Const. Co. v. Child, Utah*, 1952, 247 P. 2d 817, 820, the prime contractor, having used the bid of the subcontractor in making its bid upon the prime contract, maintained an action for the subcontractor's refusal to perform the work. Whether there was a binding contract depended upon whether there was a meeting of minds. In referring to the *use* of the subcontractor's bid, the court said:
>
> > 'Neither the fact that appellant used respondents' bid in figuring its bid to the Government, that appellant's bid to the Government was the low bid and it was finally awarded the Government contract, the *communication* of such facts *to respondents*, . . . nor all these circumstances together definitely manifested an intention to accept respondents' bid and be presently bound thereby. Each and all of these circumstances are as consistent with an intention and expectation only to negotiate a contract in the future as they are *with a present intention* to accept and enter into a binding contract.' " (Emphasis added)

This was followed in the *Milone* opinion by an equally pertinent quotation exactly to the same effect from *Williams v. Favrit*, 161 F. 2d 822 (5th Cir.), 1947.

CONCLUSION

In the final paragraph of its petition for the writ, Petitioner cites six more of its purely factual cases, beginning with *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, and closing with *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370.

Just as Petitioner argues this contract case from claimed analogies drawn from tort and other non-contract cases, so its absence of Washington cases where there are so many on the subject of proof of offer and acceptance in the law of contracts is significant not only of their dilemma, but of the rightfulness of the decision of the Court of Appeals.

We urge that the Petition for the Writ of Certiorari in this case be denied.

Respectfully submitted,

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